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THE LAW OF EMINENT DOMAIN IN PENNSYLVANIA.

BY ALFRED ROLAND HAIG.

The right of eminent domain, or that of taking private property for public use, is one inseparably connected with the sovereignty of the State, superseding all rights of private property.¹ Its existence is traceable back for centuries, without change of fundamental principles. Constitutions have since prescribed limitations, but the most important of these, that compensation must be made, has long been recognized as a moral necessity.² The provision in the Federal and State constitutions for just compensation for property taken, "is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised."³

Like the power of taxation, the right of eminent domain is dependent on the right of the State to appropriate whatever property of its subjects it may need for the public welfare; but there exists this difference: taxation is an exaction of money or services from individuals as their respective shares of contribution to any public burden; while property taken by right of eminent domain is so much beyond the individual's share of the public burden,⁴ thus rendering compensation a moral

¹ *Mayor etc. of Pittsburgh v. Scott*, 1 Pa., 309, 314; *Yost's Report* 17 *id.*, 524, 530; *Palairer's Appeal*, 67 *id.*, 479, 488; *Darlington v. United States*, 82 *id.*, 382, 386.

² Mills on Eminent Domain (2d. ed.), Section 1.

³ *United States v. Jones*, 109 U. S., 518.

⁴ *Hammett v. Philadelphia*, 65 Pa., 146, 152, per SHARSWOOD, J.

obligation irrespective of constitutional provisions. In the case of taxation there is no obligation to repay, beyond the proper application of the tax, for the payment of taxes is a duty imposed equally on all individuals, who have an interest in the purposes to which they are properly applicable.¹ But "the State should not take compulsorily where it is possible to buy, or infringe private rights unless there is no other way. Taxation is therefore the preferable mode whenever it can be successfully employed, and recourse should not be had to the right of eminent domain unless purchasing is impracticable, or would involve a disproportionate cost."²

The power of eminent domain is also essentially different from the police power inherent in the government. The exercise of the latter is generally based on disaster, fault or inevitable necessity; and compensation is not a condition of its exercise. That of the former depends on public utility, and compensation must be made. The exercise of the police power may reach to the destruction of property, as to prevent the spread of a conflagration; by virtue of it, a nuisance may be abated at the expense of him in fault, and the public safety secured.³

The right of eminent domain has its foundation in necessity, of which the sovereignty taking the property is itself the judge.⁴ It is possessed by the government of the United States, and exercisable by it within the States, but only to the extent as renders necessary the enjoyment of the powers which the Federal Constitution confers. In *Kohl v. United States*,⁵ STRONG, J., said: "The powers vested by the Constitution in the general government demand for their exercise the acquisi-

¹ *People v. Mayor of Brooklyn*, 4 Comstock, 419, 424, per RUGGLES, J.; *Sharpless v. Mayor of Philadelphia*, 21 Pa., 147, 168, per BLACK, C. J.; *Washington Ave.*, 69 *id.*, 352; *Susanna Roof's Case*, 77 *id.*, 276.

² 1 Hare's Am. Const. Law, pp. 333-4; *Hammett v. Philadelphia*, 65 Pa., 146, 155.

³ *Philadelphia v. Scott*, 81 Pa. 80, 85; per AGNEW, C. J.; *Respublica v. Sparhawk*, 1 Dallas, 357, 363; *Craig & Blanchard v. Kline*, 65 Pa. 399; *Saltpetre Case*, 12 Rep. 13.

⁴ *Darlington v. United States*, 82 Pa. 382, 386; per PAXSON, J.; *Kohl v. United States*, 91 U. S. 367, 371; per STRONG, J.

⁵ 91 U. S. 367, 371. See also *Craig & Blanchard v. Kline*, 65 Pa. 399.

tion of land in all the States. These are needed for forts, armories and arsenals, for navy yards and lighthouses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a state prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government made dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be."

But the necessity must be an actual one; it must be for the welfare of the public—in harmony with a public duty incumbent on the government to fulfil—and not for private advantage.¹ The sovereignty may delegate the right, but not to another sovereignty; nor can a State take private property for the benefit of another State or the citizens thereof—it must take for its own use; if it have no need of the land, it cannot donate it to the general government, however urgent the latter's want of it may be. Congress can provide for the condemnation of land, within a State, on which to erect buildings necessary for purposes of the Federal government, but not for the advantage of citizens of the State, for they have no higher rights thereto, nor control therein, than the citizens of any other State in the Union, as all stand on an equality under the Federal Constitution.² The land acquired within a State by the United States, through its right of eminent domain, though used for governmental purposes, is subject to the State's jurisdiction; and offences against its laws, though committed by those in the service of the United States, are punishable by the State courts.³

But the Commonwealth may delegate its right of eminent domain to individuals and corporations organized for public purposes.⁴ The right is not presumed to exist in the absence

¹ 1 Hare's Am. Const. Law, p. 336.

² *Kohl v. United States*, 91 U. S. 367; *Darlington v. United States*, 82 Pa. 382.

³ *Fort Leavenworth R.R. Co. v. Lowe*, 114 U. S. 525; 1 Hare's Am. Const. Law, p. 336.

⁴ *Finney v. Somerville*, 80 Pa. 59, 65; 1 Hare's Am. Const. Law, p. 337.

of express legislature authority;¹ and corporations invested therewith cannot, without express legislative authority, lease, sell, transfer, or otherwise dispose of such right.² It is by virtue of an Act of Assembly, or its charter, that a railroad company can mortgage its franchises.³

THE LIMITATIONS UPON THE EXERCISE OF THE
RIGHT OF EMINENT DOMAIN.

These are two :

- I. The taking must be for a public purpose.
- II. Compensation must be made.

I. THE TAKING MUST BE FOR A PUBLIC PURPOSE.

The use must be a public one, and the property taken must be actually used for a public purpose, or for one benefiting the public, mediately or immediately. All citizens may not be benefited alike, as the use may necessarily be a local one—a park, for instance, or a highway may be of advantage only to those in a particular locality; but the people in general are nevertheless interested therein, and have equal rights to the use thereof. While the benefit need not be universal, all people in similar circumstances must share therein, and not merely individuals of a certain class. The fact that a citizen has no children to educate does not make schools any the less public uses.⁴ Without public interest for its basis, the exercise of the right of eminent domain would amount to confiscation and usurpation. A mere taking is insufficient; there must be an ultimate use, and in precise accordance with

¹ *Phillips v. Dunkirk, Warren and Pittsburg R. R. Co.*, 78 Pa. 177, 181; *Stormfeltz v. Manor Turnpike Co.*, 13 id. 555.

² *Pittsburg & Connellsville R. R. Co. v. Bedford & Bridgeport R. R. Co.* 32 P. F. Smith, 104; *Barker v. Hartman Steel Co.*, 129 Pa. 551.

³ *Commonwealth v. Susquehanna & Delaware River R. R. Co.*, 122 Pa., 306; S. C. 22 W. N. C., 413, 415; 24 id. 81; *Gloninger v. Pittsburgh & Connellsville R. R. Co.*, 27 id. 497, 499; 139 Pa., 13; *Fidelity Co. v. West Penn. etc., R. R. Co.*, 138 Pa., 494.

⁴ 1 Hare's Am. Const. Law, p. 337; *Kelly v. City of Pittsburgh*, 85 Pa. 170, 178; per Gordon, J. See *Long v. Fuller*, 68 id. 170.